Filed 5/25/07 Marriage of Murray CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re the Marriage of DIANA and CLARENCE J. MURRAY.	B192592 (Los Angeles County Super. Ct. No. MD026097)
DIANA MURRAY, Appellant, v. CLARENCE J. MURRAY, Respondent.	

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark A. Juhas, Judge. Affirmed in part, and reversed in part.

Jo Ann McDole for Appellant.

No appearance for Respondent.

INTRODUCTION

Diana Murray appeals from a judgment of dissolution of her marriage to Clarence J. Murray following a contested trial. She contends that in determining

the division of property, the trial court erred by: (1) failing to award Diana at least one-half of a 401k distribution taken by Clarence as sole distributee; (2) failing to award Clarence the entire income tax obligation arising from the 401k distribution; (3) failing to order Clarence to reimburse Diana for separate property funds she contributed to the down payment of the family residence and to home improvements; (4) failing to require Clarence to maintain life insurance with Diana as beneficiary; and (5) failing to award the entire amount of attorney fees requested by Diana. We agree that the trial court erred in failing to reimburse Diana for contributions she made to the community property residence out of her separate property. We order the judgment modified to reimburse Diana in the sum of $7,400. In all other respects, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Evidence

The parties were married in February 1981. They separated on October 1, 2002, although they both continued to reside in the family residence until June 2003. Diana filed a petition for dissolution of marriage on November 13, 2002. The evidence presented at trial was as follows.

1. *The 401k Distribution to Clarence as Sole Distributee*

Clarence began working at Lockheed Martin Corporation in September 1982. He had a Lockheed Salaried Savings Plan (the 401k), which as of October 1, 2002, contained a balance of $184,849.61. Two weeks after the parties separated, on or about October 14, 2002, Clarence withdrew $121,327.45 from the

401k.[1] From the $121,327.45, the Lockheed plan administrator withheld $26,692.04 in state and federal income taxes. Thus, the net distribution to Clarence was $94,635.41.

Diana testified that she did not authorize the withdrawal, did not receive any of the money Clarence withdrew, and did not have access to the account into which the money was deposited. Clarence exercised complete control over the withdrawn funds. He used $20,000 as a down payment on a home in North Carolina. Diana said she first became aware of Clarence's withdrawal of the 401k funds in March 2003, when she received from the parties' tax accountant a joint tax return for the 2002 tax year. When she became aware of the tax obligation, Diana contacted the accountant and informed her that she would not be filing a joint return with Clarence. Diana instructed the accountant to prepare a tax return for Clarence using the filing status of married filing separately. On March 28, 2003, the tax accountant represented in writing that she had electronically filed the 2002 tax return on behalf of Clarence and that his filing status was married filing separately. However, the accountant had electronically filed the tax return to which Diana had objected, with the parties' filing status designated as married filing jointly.

Clarence testified that Diana had eventually decided that she did not want to see him paying "the tax man" all that money, so she had called the accountant and told her to file jointly. Clarence further testified that Diana was aware, prior to his withdrawing the 401k funds, that he was going to use the money to pay off community debts. Clarence also testified that when he withdrew the 401k funds he

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[1] The 401k distribution was not made pursuant to a qualified domestic relations order (QDRO). A QDRO regarding the 401k distribution was filed after judgment was entered on April 15, 2004.

thought the parties might stay married and relocate to North Carolina when Clarence retired.

It was undisputed that Clarence spent $46,391.17 to pay off community debts.[2] Clarence testified that he spent an additional $8,794.78 from the 401k distribution to pay off both community property debts and separate debts for the benefit of the community, including payments for car insurance for the family's four vehicles, for maintenance costs on the family vehicles, and for an Exxon credit card. Clarence was apparently testifying in reference to a document listing $8,794.78 in debts he had purportedly paid, which had been prepared by his attorney; however, the list was not admitted into evidence.

Diana objected to Clarence being reimbursed for the $8,794.78, arguing he had not demonstrated that he spent the money on reimbursable items, but rather that he spent it on post-separation debts. She also argued that the payments were not made from the 401k distribution because by the time the payments were made the 401k money had been depleted.

At the time of separation, Diana had debts in her name incurred during the marriage for her Jeep Grand Cherokee, and for JC Penney and Visa credit cards. Clarence did not pay off any of these debts.

A state and federal income tax deficiency totaling $15,172 was assessed against both parties because of the 401k withdrawal. At trial, Diana argued that

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[2] Between October 16, 2002 and November 1, 2002, Clarence paid via checks drawn on his Lockheed Federal Credit Union (LFCU) savings account the following creditors: $8,447.99 to LFCU to pay off a line of credit; $17,113.71 to High Desert Federal Credit Union to pay off Clarence's Ford Expedition; $4,870.34 to pay off a Discover credit card; $3,070.07 to State Street Bank to pay off "the patio loan"; $5,000 to Jeffrey Maxheimer to pay off the parties' son Richard's car; $5,639.06 to pay off an MBNA line of credit; and $2,250 to pay off a First USA Bank credit card.

Clarence had breached his fiduciary duty by withdrawing the 401k money, and requested that Clarence be ordered to pay the entire tax obligation on the 401k distribution.

Diana presented evidence that if the withdrawal had not occurred, and Clarence and Diana had filed a joint tax return, they would have received a federal refund of $868 and a state refund of $1,160.

2. *Diana's Separate Property Contributions to the Community Residence*

Diana testified that in August 1997 she provided the $5,000 down payment for the purchase of the family residence from separate property funds she received from her parents. She also paid $2,400 out of her separate property funds to build a patio at the parties' residence in September 1997. The down payment and home improvement money came from a Bank of America account in her name and her mother's name, into which Diana's parents periodically deposited money which they permitted her to use. She did not commingle any funds from Clarence in that account. At various times she used money from the Bank of America account to pay for the children's clothes, computers, and for bills and taxes. Diana repeatedly stated that the money in the Bank of America account was from her parents; no money from any other source was deposited into the account.

Diana testified that she had only a savings account at Bank of America at the time she made the down payment. She later said she also had a Bank of America checking account. Asked if she ever had a "maximizer" account there, she said yes, possibly during the period she had the savings account with her mother. At one time she also had a Bank of America account that held three certificates of deposit. All of the Bank of America accounts were linked, and she received one combined statement as to all of the accounts. At the time of trial, the maximizer account did not exist, nor did the certificates of deposit. She had used all of that

money to pay for household expenses. As of January 2000 there was $32,000 in her Bank of America accounts. Asked where all of that money came from, she said "My grandmother died, and that's where some of the money came from. It was from my parents." The source of any money held in her linked Bank of America accounts was either her parents or her deceased grandparent.

Regarding the $5,000 down payment, Diana identified exhibit 12, a cashier's check for $6,800 dated August 18, 1997, payable to Lawyers Title, and exhibit 13, a bank statement showing a withdrawal of $9,400 on August 18, 1997 from Diana's Bank of America account. Neither exhibit was admitted into evidence, but Diana testified that she purchased the cashier's check with the $9,400 she withdrew from her Bank of America account; the $6,800 included the $5,000 down payment and closing costs. She further testified that exhibit 111, also identified but not admitted into evidence, was a fax she received from her mother, dated August 17, 1997, authorizing her to use the money in their shared Bank of America account. She also identified exhibits 113 and 114, which were electronic transfers made by her parents shortly before the down payment was made, by which they transferred money into the joint Bank of America account. These exhibits also were not admitted into evidence. Clarence did not raise objections to any of these exhibits.

Regarding Diana's claim that she paid $2,400 from her separate property for the patio project, she presented exhibit 103, which included an invoice from Concrete Plus for $2,400, and a receipt for a cashier's check from Bank of America in that amount. These exhibits also were not admitted into evidence.

Clarence testified that he and Diana never had a joint checking or savings account at Bank of America. He said that they had an equity loan at Bank of America, but not one from which they could continue to draw funds by writing checks; it was not a checking account. According to Clarence, in addition to the

joint account with her mother, Diana also had a separate Bank of America account in Victorville in her name alone. He did not know the source of the money that was deposited into the latter account. Clarence testified that he thought Diana made the $5,000 down payment from a "Putnam IRA account," which contained money from her J.C. Penney 401k plan, or from her Social Security payments. He failed, however, to show any withdrawals from the Putnam account.

Clarence disputed that Diana paid $2,400 from a separate property account for the patio construction, but agreed that she did pay $1,100 to have cement poured. He did not know the source of that payment, but stated his willingness to reimburse her in the amount of $1,100. He testified he used part of the funds from the 401k distribution to pay off a loan the parties had for the patio project, referring to the undisputed payment of $3,070.07 to State Street Bank for the patio loan.

Diana testified that she had a separate account in Victorville at High Desert Federal Credit Union into which she deposited her earnings, Social Security checks, and workers' compensation checks.

3. *Clarence's Life Insurance*

Clarence testified that he owned two life insurance policies, on which he made payments during the marriage. He had a term life insurance policy through Woodman, which had a face value of $30,000. He also had a Prudential life insurance policy through his employment at Lockheed, which had a face value of $124,000. He had removed Diana as beneficiary prior to their separation, but intended to maintain his children as beneficiaries on the Woodman policy. He anticipated that he could not afford to maintain the Prudential policy after he retired, but he did not know how much it would cost to do so. He noted that when he stopped paying on it, it would have no value.

Diana requested that the life insurance policies be awarded to her for spousal support in the event of Clarence's death.

4. *Award of Attorney Fees*

Diana requested an award of $7,500 in attorney fees. She had incurred $27,250 in fees. Clarence's annual income was $77,000, while Diana received $538 per month in Social Security disability benefits.

B. The Trial Court's Decision

1. *The Trial Court's Oral Ruling, and the First Appeal*

Following closing arguments on January 29, 2004, the trial court announced its ruling in open court, and also entered a minute order detailing its ruling.

On February 6, 2004, Diana filed and served a request for a statement of decision. The request was rejected as untimely by the trial court on February 19, 2004. Judgment was entered by the court on April 14, 2004. Diana appealed from the judgment, and this court reversed the judgment and remanded the matter to the trial court for the issuance of a statement of decision, with opportunity thereafter for comment and objections. (*In re Marriage of Murray*, filed August 16, 2005, nonpub. opn. (B176261).)

2. *The Trial Court's Statement of Decision*

After the remittitur issued, the trial court prepared a proposed statement of decision, to which Diana filed objections.[3] The court thereafter filed its statement of decision and the judgment.

a. *Ruling on the 401k Distribution*

The language contained in the court's statement of decision and its judgment was essentially identical. The court found that it was undisputed that the net distribution to Clarence was $94,635.41, and that he spent $46,391.17 to pay community debts. "The evidence before the court at the time of the trial demonstrated that [Clarence] through the various exhibits accounted for all of the money, leaving a balance of $39,643.65. The court notes that this amount is also accounted for in the evidence in the trial. [Clarence] received an after-tax disbursement in the amount of $94,635.41. [Clarence] paid community debt in the amount of $46,391.17, leaving a balance of $48,244.24. At the time of the disbursement, it is evident that the parties were still living together. The Court finds based on the evidence before the court that [Clarence] paid an additional $8,600.59 in either community debt or separate property debt, for the benefit of both Parties, with the exception of the $194.19 that was paid for the benefit of the parties' son. [¶] The court believes that this accounting is factual proof, not a legal proof. The law requires that [Clarence] account for the various monies, the court believes that he did so adequately under his burden of proof." Because Clarence got sole benefit of the $20,000 he used for a down payment on his house

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[3] We shall address the court's proposed statement of decision, and Diana's objections thereto, in our discussion of the various issues on appeal, to the extent those documents prove to be relevant.

in North Carolina, the court ordered him to bear the tax obligation for that amount; the remaining tax obligation was to be split equally. The court ruled Clarence was to bear responsibility for any penalties and interest incurred for late payment of the taxes.

"The Court did not take into account, nor did it consider if it was a sound financial decision to remove money from the 401(k). The evidence shows the Parties took money out of [the] 401(k) in the past and the court believes that [Diana] was aware that this money was being withdrawn from the account. [Diana] received benefit of having over $50,000.00 in debt paid, and is essentially debt-free with the exception of the Jeep and credit card debts. [¶] The Court notes that there is sufficient evidence before the Court with all the confusion of the tax returns that [Diana] had knowledge there was a withdrawal from the 401(k). Because it is apparent to the court that [Diana] was aware of the 401(k) withdrawal and received a financial advantage from it, the court finds that there is insufficient evidence that [Clarence] breached his duties under the law as far as fiduciary duties are concerned. Because the court found that [Diana] was aware of the distribution, there is no 'impairment' of the community estate, nor any breach of the fiduciary duty. Further, as noted above, the distribution was adequately accounted for. Contrary to [Diana's] position, the evidence shows that while [Clarence] did indeed use part of the distribution for his separate purposes, [Diana] was not harmed by this distribution."

The court continued: "[Diana] points to Family Code §2623(a) and (b) and §2625; §2623 deals with the post separation debts and §2625 deals with separate debts incurred before the date of separation. [Diana] appears to be referring to the tax obligation on the 401(k) withdrawal. To the extent that [Clarence] used those monies from his home in North Carolina or interest and penalties were incurred, he is obligated to pay the entire IRS obligation. To the extent that the monies were

used to pay a separate obligation of [Diana] or community obligation, the tax burden is to be shared equally. Those debts, obligations, and liabilities known to both Parties and incurred prior to the Separation Date (and not otherwise specifically assigned to a Party under this Judgment), were paid by the Party responsible for incurring the debt.

"The court read and considered Karem vs. Commissioner 100 T.C. 521 (1993). The court does not believe that the case controls for many reasons, one being that the distribution in Karem was post dissolution, and in the instant matter the distribution was pre-dissolution. Additionally, the distribution was for the benefit of the parties as community debt was repaid, to the extent that the distribution benefited [Clarence], he bears that portion of the tax burden."

From the net 401k distribution of $94,635.41, the court subtracted the allowable debt repayments of $46,391.17 and $8,600.59. This resulted in a remaining balance of $39,643.65 from the 401k distribution. The court awarded, one-half, or $19,821.82, to Diana. The court awarded each party one-half of the proceeds ($89,386.38) from the sale of the family residence, but reduced Clarence's interest in the sales proceeds by $19,821.82.

The lien on Diana's Jeep Cherokee in the amount of $6,330 was ordered to be split equally between the parties. The debt on the credit cards in Diana's name was assigned to her.

b. *Ruling on Diana's Separate Property Contributions*

The court refused to order reimbursement on the basis that Diana had not established that the $5,000 for the down payment and the $2,400 for the patio project were Diana's separate property. The court noted that in seeking reimbursement the burden was on Diana to prove tracing. The court found "there is no evidence before the Court where these moneys came from, except exhibits

113 and 114, which were not admitted into evidence. There is no indication if that money was a gift to the community or what the money was. The house was held in joint tenancy and was community property. The Court finds [Diana] failed to carry her burden of proof that the down-payments or the payment for the patio was separate property. The court also finds that there was insufficient admitted evidence tracing the source of the funds in the Bank of America account, or that the down payment came from [Diana's] job at J.C. Penney. Therefore, the Court will not award the $5,000.00 as separate property, nor reimbursement of $2,400.00."

c. *Ruling on Clarence's Life Insurance*

The court ruled as follows: "To the extent that the life insurance policies remain in force, [Clarence] is ordered to make [Diana] the beneficiary of the life insurance policy. [Clarence] is not, however, ordered to maintain the policies in force at his expense. The evidence established that the life insurance policy from Lockheed would cease to be in force upon the retirement of [Clarence], an event the parties clearly contemplated during the course of the marriage. The evidence also demonstrated that the Woodmen of the World policy is a term policy, thus there was no community build up of value in the policy. Neither the facts, nor the law demonstrated to the court that [Clarence] had an obligation to maintain the policy in force as a support obligation as [Diana] was receiving her support from [Clarence's] retirement. Family Code section 4360 allows a discretionary award of a life insurance policy, in light of the spousal support award and guaranteed retirement payments requiring [Clarence] to maintain the term policy in force did not appear appropriate."

d. *Award of Attorney Fees*

The court stated: "It was evident to the Court after two (2) days of trial that a mandatory settlement conference was needed [so the parties could agree on the underlying facts and property division] as much of the trial time was being consumed on issues about which there was little dispute. Court and counsel held two (2) unsuccessful MSC's." Considering the nature of the litigation, its difficulty, the amount involved, the skill required and employed, attention given, success of attorney's efforts and attorney's learning and experience, intricacies and important of litigation, necessity of skilled legal training, time consumed: the case was not one of special legal significance or importance, or one that required the amount of time taken in court; the issues were straightforward. Diana and her counsel consumed much court time by proving facts repetitively through numerous documents, and this was unreasonable and unnecessary. The court acknowledged that Clarence is the superior wage earner, but the fees charged were excessive. Many of the hours spent were not necessary to a disposition of the case. The court did not feel that the fee request was reasonable and necessary in light of the facts of the case. Accordingly, the court awarded attorney fees to Diana of $4,000.

After entry of judgment, Diana filed a timely notice of appeal.

DISCUSSION

Clarence did not file a respondent's brief, after due notice pursuant to rule 8.220, California Rules of Court. In this situation, we "examine the record on the basis of appellant's brief and . . . reverse only if prejudicial error is found. [Citations.]" (*Walker v. Porter* (1974) 44 Cal.App.3d 174, 177.)

I. Issues Arising from the 401k Distribution

A. *Breach of Fiduciary Duty*

Diana contends the trial court erred in not awarding Diana at least one-half of the 401k distribution in that, as a result of the distribution, Clarence impaired Diana's interest in the money in breach of his fiduciary duty. We note that Diana filed objections to the proposed statement of decision with regard to the court's resolution of the breach of fiduciary duty issue, but conclude that the court adequately stated the legal and factual grounds upon which its judgment was based. We review the court's ruling under the substantial evidence standard. (*Bono v. Clark* (2002) 103 Cal.App.4th 1409, 1430.)

The record supports the trial court's determination that Diana failed to carry her burden of proving that Clarence's conduct constituted a breach of fiduciary duty. Regardless of whether Clarence's decision to withdraw money from his 401k was financially wise, the trial court credited Clarence's testimony that he did not conceal his actions from Diana. The court plainly believed that the parties had spoken about the distribution prior to its occurrence, and did not credit Diana's testimony that she knew nothing about it until she received the tax return from the accountant. Perhaps most importantly, Diana benefited from Clarence's actions by having over $50,000 in debt paid; she was essentially debt-free with the exception of her credit card debts and half of the remaining debt on her car. The trial court's conclusion that Clarence's actions did not constitute a breach of fiduciary duty was fully supported by the evidence. (See, e.g., *Bono v. Clark, supra*, 103 Cal.App.4th at p. 1430, citing Fam. Code, §§ 1100-1101, 2102; and *In re Marriage of Moore* (1980) 28 Cal.3d 366, 374-375 [wife failed to prove husband's misappropriation of missing community property].)

As to Diana's complaint that she was awarded only $19,821.82 of the $121,327.45 distribution, the record does not bear out this contention. Rather, with

the payment to Diana of $20,000, the distribution of the 401k money would be equal. To wit, the court found that the parties were to share equally the income tax obligation resulting from the distribution, except with regard to the $20,000 Clarence used for a down payment on a home in North Carolina because he alone benefited from that portion of the distribution. Of the $94,635 net distribution, $54,991 was used to pay off community debts and separate property debts for the benefit of the community; in other words, the parties shared the advantage of that money. The remaining $40,000 was to be split between the two; Clarence had already used his half on the down payment and owed Diana $20,000. Whether substantial evidence supported the court's characterization of $8,600 worth of payments as being for community debts and separate property debts for the benefit of the community, and whether the trial court correctly allocated the income tax obligation between the parties, are issues we shall next address.

B. *Reimbursement to Clarence for Additional Debts Paid*

It was undisputed that Clarence used $46,391 to repay community debt. In addition, he testified that he spent an additional $8,794.78 from the 401k distribution to pay off both separate and community property debts. He testified in reference to a document enumerating $8,794.78 in debts he had purportedly paid, which was later identified as exhibit 125 but not admitted into evidence.

Diana objected to Clarence being reimbursed for the $8,794.78, arguing he had not demonstrated that he spent the money on reimbursable items, but rather that he spent it on his separate debts, post-separation.[4] The court had admitted into

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[4] In her objections to the proposed statement of decision, Diana did not request that the court state the facts upon which it relied in reimbursing Clarence specifically for the $8,600. In any event, it is apparent that the court relied on Clarence's testimony in reference to the document identified as exhibit 125.

evidence, however, numerous canceled checks from Clarence's LFCU account, some of which were for the payments listed on exhibit 125. The court's oral comments on January 29, 2004 directly relied on exhibit 125: "[Clarence] testified—and I believed him . . . that he paid exhibit 125; that he made those payments for the benefit of the community, or . . . it was for the benefit of the community . . . or he was paying a separate property debt for her car insurance or his car insurance while they were living together. Either way, that I was comfortable with this . . . $8,600.59." The judgment states the court's conclusion that the parties were still living together, and that Clarence paid $8,600.59 in either community debt or separate property debt, for the benefit of both parties.[5]

We conclude the court's findings were adequate, and were supported by substantial evidence. The court had before it evidence of specific expenditures made by Clarence for the benefit of both parties. The court properly disallowed $194.19 that Clarence spent on gifts for their son Richard without Diana's agreement.

We note that Diana also contended that the payments were not made from the 401k distribution because by the time the payments were made the 401k money had been depleted. As the court stated, however, dollars are fungible; whether Clarence technically paid for these items out of the 401k distribution or from his separate earnings post-separation, he was entitled to be credited for them.

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[5] Contrary to Diana's contention on appeal, the $4,780 Clarence said he paid in April 2003 for state and federal income taxes were for the 2002 tax year, and were not his post-separation debt.

C. *Attribution of Income Tax Liability*

Having concluded there was no breach of fiduciary duty, the trial court ruled that the tax liability for the 401k distribution would be shared equally by the parties, except that Clarence was ordered to shoulder the tax burden attributable to the $20,000 he used for a down payment on his home in North Carolina. Clarence was also ordered to pay any penalties incurred as a result of late payment of the additional taxes imposed.

Diana contends that the trial court erred in not awarding Clarence the entire income tax obligation arising from the 401k distribution in that he was the sole distributee, and the distribution was not made pursuant to a QDRO. Diana cites to federal income tax law, both statutory and case law, as follows: "Distributions from qualified plans are generally taxed to the distributee. 26 USC Sec. 402(a). For tax purposes, an alternate payee who is the spouse or former spouse of a plan participant, is treated as the distributee only when payment or distribution is made directly to him or her by the plan administrator pursuant to a qualified domestic relations order. 26 USC Sec. 402(e)(1)(A). Absent a qualified domestic relations order, a pension distribution is entirely taxable to the participant even though one-half is distributed to the participant's ex-spouse according to state community property law. Karem v. Commissioner [(1993)] 100 TC 521, Burton v. Commissioner, TC Memo 1997-20, 26 USCA Sec. 402(a) and (b)(2), 26 USCA Sec 402 (e)(1)(A)." Diana points out that ERISA supersedes state laws as they relate to employee benefit plans; however, preemption does not apply to qualified domestic relations orders.

In *Karem v. Commissioner of Internal Revenue* (1993) 100 TC 521, after the marriage of Robert and Barbara Karem was dissolved but before their community property was partitioned, Barbara consented to Robert's election of a lump-sum distribution from his pension plan, and the net distribution was divided between

Robert and Barbara in Louisiana state court. The Internal Revenue Service contended that Robert had to include all of the distribution in his gross income for the year in which he took the distribution. Robert countered that Barbara should be treated as the distributee of one-half of the distribution. The tax court held that Robert was to be treated as the sole distributee, regardless of the existence of a qualified domestic relations order under which Barbara was made the alternate payee of half of the distribution, and also regardless of Louisiana community property laws. (*Karem, supra*, at pp. 524-531.)

Diana contends that there is no material distinction between *Karem* and the case before us, and that pursuant to *Karem*, Clarence should have been responsible for the payment of all taxes associated with the distribution. We disagree. Regardless of whether *the IRS* can legally seek the payment of income taxes from one or both spouses, a state court deciding a marital dissolution action can distribute the spouses' liabilities in accordance with state law. The latter situation is not governed by *Karem* or the federal tax statutes discussed therein, but instead is controlled by the California statutory provisions regarding property division. (See, e.g., Fam. Code, § 2551 ["For the purposes of division and in confirming or assigning the liabilities of the parties for which the community estate is liable, the court shall characterize liabilities as separate or community and confirm or assign them to the parties in accordance with Part 6 (commencing with Section 2620)."].)

Diana further contends that the court erred in allocating the income tax liability because Diana did not intend to file a joint income tax return. However, the court's allocation of the tax liability was based on its finding that the parties shared the benefit of the distribution and therefore should share the tax liability. Apparently the total tax liability would have been even greater if Clarence had filed a tax return with the filing status of married filing separately. Given the court's conclusion, which we have determined to be supported by substantial

evidence, that the parties shared the benefit of the distribution, Diana's objection to the filing status declared on the income tax forms is simply not determinative of the propriety of the allocation of tax liability. Further, it is inaccurate to characterize the income tax obligation as having been incurred post-separation, solely by Clarence. As the employee holder of the 401k plan, he requested and received the distribution, but the proceeds were community property, and both parties enjoyed the benefit of the distribution.

II. Diana's Request for Reimbursement of Separate Property Funds

Diana contends that the trial court erred in failing to order that she be reimbursed $5,000 she paid from her separate property funds for the down payment for the purchase of the family residence, and $2,400 she paid from those funds for home improvements. We agree.

Diana objected to the statement in the court's proposed statement of decision that there was no evidence before the court as to where the down payment and home improvement money came from, except exhibits 113 and 114, which were not admitted into evidence, and that there was no indication if the money was a gift to the community. In the proposed statement of decision, the court also stated that there was insufficient evidence concerning the source of the funds in the Bank of America account, and insufficient evidence to show that the down payment did not come from Diana's job at J.C. Penney. In objecting to the proposed statement of decision, Diana pointed out with specificity the additional evidence and testimony, other than exhibits 113 and 114, regarding the source of the down payment and home improvement funds. Diana asserted that the evidence was overwhelming that the money in the Bank of America account was not community property, but was money given to Diana as a gift from her parents.

In response to Diana's objections, the court made minor changes to the proposed statement of decision, to essentially read as it does in the final statement of decision, adding only that there was insufficient "admitted" evidence to support Diana's position. Diana again filed detailed objections.

The court entered judgment, stating: "there is no evidence before the Court where these moneys came from, except exhibits 113 and 114, which were not admitted into evidence. There is no indication if that money was a gift to the community or what the money was. The house was held in joint tenancy and was community property. The Court finds [Diana] failed to carry her burden of proof that the down-payments or the payment for the patio was separate property. The court also finds that there was insufficient admitted evidence tracing the source of the funds in the Bank of America account, or that the down payment came from [Diana's] job at J.C. Penney. Therefore, the Court will not award the $5,000.00 as separate property, nor reimbursement of $2,400.00."

Insofar as the court rested its decision on the ground that there was no evidence (except exhibits 113 and 114, which were not admitted) showing the source of the funds, the court was mistaken. There was evidence before the court, in the form of Diana's testimony, that Diana made the $5,000 down payment for the house, and the $2,400 payment for the patio improvement, out of a Bank of America account into which her parents deposited money for her use. She testified that no money from any other source was deposited into the account. Further, although by inadvertence the supporting exhibits were not introduced into evidence, they were nonetheless identified by Diana, who described their contents. Clarence agreed the parties never had a joint account at Bank of America, and he produced no evidence to dispute Diana's testimony. His claim that she may have paid the funds out of her earnings at J.C. Penney or Social Security was entirely speculative. Although he disputed that she paid $2,400 out of her separate

property for the patio, he agreed to reimburse her $1,100 for her contribution to the patio project.

"'It is a general rule that the uncontradicted testimony of a witness to a particular fact may not be disregarded, but should be accepted as proof of the fact.'" (*Anso v. Anso* (1925) 72 Cal.App. 513, 516.) Of course, "[a] trial court may conclude a witness' testimony is so inherently incredible that it must be disregarded, even though there is no adverse testimony." (*Bassett Unified School Dist. v. Commission On Professional Competence* (1988) 201 Cal.App.3d 1444, 1451.) In the instant case, however, Diana's testimony was not inherently improbable, and there is nothing to indicate in the court's statement of decision that the court disbelieved that testimony. Rather, the court's decision rests on the conclusion that there was "no evidence" to support Diana's position.

"When a statement of decision . . . is ambiguous and the record shows that the omission or ambiguity was brought to the attention of the trial court . . . prior to entry of judgment . . . , it shall not be inferred on appeal . . . that the trial court decided in favor of the prevailing party as to those facts or on that issue." (Code Civ. Proc., § 634.) Because Diana properly requested a statement of decision and submitted specific objections to the trial court's proposed statement that no evidence supported her position, and because the court's statement of decision is at best ambiguous on the question whether the court found Diana's testimony not credible, we do not imply such a credibility finding in support of the judgment. (See *Fladeboe v. American Isuzu Motors, Inc.* (April 23, 2007) 2007 WL 1191135; 2007 DJDAR 5573, 5578; *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133-1134.)

Without applying the doctrine of implied findings, we proceed to review the record to determine whether there was substantial, uncontradicted evidence to support Diana's position. We conclude that there was, and therefore order the

judgment modified to reimburse Diana in the sum of $7,400. (See *Charlotte Guyer & Associates v. Franklin Factors* (1963) 211 Cal.App.2d 690, 696 [judgment modified to increase award to plaintiff where "no issue of fact is raised concerning the determination, defendants have not controverted plaintiff's argument on the point and the correct figures are ascertainable from the record"].)

The evidence presented by Diana was sufficient to trace the down payment and home improvement contribution to her separate property, and Clarence did not present evidence sufficient to contradict Diana's evidence. The only contrary evidence was wholly uncorroborated speculation by Clarence that the money was from Diana's job at JC Penney or her Social Security payments. He said he did not know the source of the $2,400 payment. He further testified that he used part of the funds from the 401k distribution to pay off a loan the parties had for the patio project, but he did not state that all of the money for the project came from that loan. In fact, he agreed to reimburse her $1,100 for concrete for which he acknowledged she had paid.

At one point during trial, the court indicated that Diana had testified she had only one Bank of America account, but later acknowledged she had four accounts there. Diana's counsel pointed out that all of the accounts were linked and appeared on one statement, and that Diana testified some of the money in the accounts was inherited from her grandparent, and the rest was from her parents. The court responded, "That's not the evidence, but okay." Our review of the record indicates that the evidence was as Diana's counsel stated.

In addition, the trial court's focus on the purported lack of indication "if that money was a gift to the community or what the money was," and on the fact that "[t]he house was held in joint tenancy and was community property," indicate that the trial court failed to apply the correct legal standard.

Family Code section 2640 provides in relevant part: "(a) 'Contributions to the acquisition of property,' as used in this section, include downpayments, [and] payments for improvements . . . . [¶] (b) In the division of the community estate under this division, unless a party has made a written waiver of the right to reimbursement or has signed a writing that has the effect of a waiver, the party shall be reimbursed for the party's contributions to the acquisition of property of the community property estate to the extent the party traces the contributions to a separate property source." Thus, "[u]nder section 2640, a spouse has a right to receive reimbursement at the time of dissolution for any separate property payments for improvements to community property, unless there has been a written waiver. (*In re Marriage of Walrath* (1998) 17 Cal.4th 907, 919; *In re Marriage of Anderson* (1984) 154 Cal.App.3d 572, 577.)" (*In re Marriage of Cochran* (2001) 87 Cal.App.4th 1050, 1056-1057.)

"Property owned by either spouse before marriage, or acquired by gift or inheritance during marriage, is that spouse's separate property. (Fam. Code, § 770.)" (*In re Marriage of Weaver* (2005) 127 Cal.App.4th 858, 864.) "Generally, a spouse who converts his or her own separate property to community property is entitled to reimbursement for the separate property contribution in the event of marital dissolution, unless the right is waived in writing. The Law Revision Commission comment to section 2640 explains: 'Under Section 2640, in case of dissolution of the marriage, a party making a separate property contribution to the acquisition of the property *is not presumed to have made a gift* unless it is shown that the parties agreed in writing that it was a gift, but is entitled to reimbursement for the separate property contribution at dissolution of marriage. . . .' (Cal. Law Revision Com. com., reprinted at 29D West's Ann. Fam. Code (2004 ed.) foll. § 2640, at p. 590.)" (*In re Marriage of Weaver*, *supra,* 127 Cal.App.4th at p. 866, italics added.) It is undisputed that in the present case there

was no writing showing the parties agreed that the down payment and home improvement contributions were gifts to the community.

In addition, commingling of separate and community property does not alter the status of the separate property interest so long as it can be traced to its separate property source. (*In re Marriage of Braud* (1996) 45 Cal.App.4th 797, 822-823.) Thus, the fact Diana's separate property funds were used to purchase and improve the family home, which was "held in joint tenancy and was community property," did not alter Diana's right to reimbursement.

We therefore reverse the portion of the judgment that denies Diana reimbursement for the $5,000 down payment and the $2,400 contribution to the home improvement project. Separate property contributions are reimbursed before dividing the remaining community property. "'Under section 2640, the separate property contribution is reimbursed *prior* to the division of community property. (*In re Marriage of Witt* (1987) 197 Cal.App.3d 103, 105, 108-109; *In re Marriage of Tallman* (1994) 22 Cal.App.4th 1697, 1698-1700; Hogoboom & King, Cal. Practice Guide: Family Law 2 (The Rutter Group 1997) ¶ 8:466, p. 8-118.1 ["A reimbursement award comes off the top of the community property item in question before the [community property] interest in that property is divided." (Italics omitted.)].)" (*In re Marriage of Geraci* (2006) 144 Cal.App.4th 1278, 1286.)

The judgment is ordered to be modified to reflect that Diana is entitled to be reimbursed by Clarence in the amount of $7,400, that amount is to be subtracted from the proceeds of the sale of the family home. The remaining proceeds are then to be divided equally between the parties, less the deductions owed by Clarence as indicated in the judgment.

III. Life Insurance

Diana contends the trial court erred by failing to include in the judgment an order requiring Clarence to maintain life insurance with Diana as beneficiary to ensure Diana's continued support in the event of Clarence's death. She further contends that Clarence used community assets to pay the premiums on the Prudential policy, and therefore she had an interest in the policy which the court ignored. We find no error.

The two life insurance policies at issue had no cash surrender value. Therefore, the policies had no value to be divided as community property. "[U]nlike whole life insurance, term life insurance is generally accepted as having no value, since once its term has expired it is worthless. (Markey, Cal. Family Law, Practice and Procedure, § 24.45[3][e] p. 24-55; Hogoboom, Cal. Basic Practice Guide, Family Law, § 8:313.)" (*In re Marriage of Lorenz* (1983) 146 Cal.App.3d 464, 468; but see *In re Marriage of Gonzalez* (1985) 168 Cal.App.3d 1021, 1024-1026.) Nonetheless, Family Code section 4360 provides that "where it is just and reasonable in view of the circumstances of the parties, the court, in determining the needs of a supported spouse, *may include an amount sufficient to purchase an annuity for the supported spouse or to maintain insurance for the benefit of the supported spouse on the life of the spouse required to make the payment of support*, . . . so that the supported spouse will not be left without means of support in the event that the spousal support is terminated by the death of the party required to make the payment of support." (Italics added.)

Pursuant to Family Code section 4360, it is within a trial court's discretion to order a spouse to maintain life insurance for a supported spouse; it is by no means obligatory for the trial court to do so. It is appropriate to enter such an order only "where it is just and reasonable in view of the circumstances of the parties." Under the circumstances here, the court ordered Clarence to make Diana the

beneficiary of any life insurance policy he might maintain, but refused to order Clarence to maintain the policies in force at his expense. Diana would be receiving her support from Clarence's retirement, and therefore requiring Clarence to maintain the term policy in force did not appear appropriate. In her perfunctory discussion with regard to this issue, Diana failed to establish that the court's ruling was unreasonable. In any event, we are not required to discuss or consider points which are not adequately supported by citation of authorities, as is the case here. (*Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979.)

IV. Award of Attorney Fees

Diana requested an award of $7,500 in attorney fees. She had incurred $27,250 in fees. The court awarded Diana $4,000 in fees.

Our review of the court's statement of decision and the judgment reveals that the trial court considered the appropriate factors in arriving at the award of attorney fees (the nature and difficulty of the litigation, the amount in controversy, the skill required and employed, the success of the attorney's efforts, the attorney's learning and experience, and the time consumed). The court concluded that the case was not one of special legal significance or importance, or one that required the amount of time taken in court. The court acknowledged that Clarence is the superior wage earner, but concluded that the fees charged by Diana's counsel were excessive, and that many of the hours spent were not necessary to a disposition of the case. The court did not feel that the fee request was reasonable and necessary in light of the facts of the case.

Diana's brief argument on appeal, unsupported by case authority, merely asks that we revisit the factual determinations made by the trial court. As the award of fees rested within the sound discretion of the trial court, and Diana has not demonstrated clear error, we will not disturb the judgment in this regard.

Diana also asserts that she is entitled to an award of attorney fees on appeal. We deny her request, however, because she failed to develop any argument or analysis on the subject.

DISPOSITION

The portion of the judgment regarding reimbursement to Diana of her separate property contributions in the amount of $7,400 is reversed, and the trial court is instructed to revise the judgment to reflect that Diana was entitled to be reimbursed in that amount, prior to division of the proceeds from the sale of the family residence. In all other respects, the judgment is affirmed. Each party shall bear his or her own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.